



# Environmental Appeal Board

**Citation:** *Kalia Resources Corp. & Joseph Kitzke v. Director, Environmental Management Act, 2023 BCEAB 9*

**Decision No.:** EAB-EMA-22-A006(a)

**Decision Date:** 2023-04-06

**Method of Hearing:** Conducted by way of written submissions concluding on January 5, 2023

**Decision Type:** Decision on Method of Hearing

**Panel:** Shannon Bentley, Panel Chair

**Appealed Under:** *Environmental Management Act, S.B.C. 2003, c. 53*

**Between:**

Kalia Resources Corp. & Joseph Kitzke

**Appellant(s)**

**And:**

Director, *Environmental Management Act*

**Respondent**

**Appearing on Behalf of the Parties:**

For the Appellant(s): Casey Leggett, Counsel

For the Respondent: Tharani Balachandran, Counsel

## PRELIMINARY DECISION ON METHOD OF HEARING

### INTRODUCTION

[1] This decision determines the method of hearing to be used in this appeal of an administrative penalty under the *Environmental Management Act S.B.C. 2003, c.53* (“EMA”), filed with the Environmental Appeal Board (“Board”) on April 13, 2022.

[2] The Board held pre-hearing conference meetings with the parties to address a variety of matters before proceeding to a hearing of the appeal. In one of those meetings, it became clear that the parties disagreed as to the method of hearing to be used in this appeal.

[3] The Appellants, Mr. Kitzke and Kalia Resources Corp., submit that an oral hearing would be more appropriate in the circumstances, while the Respondent submits that a written hearing is more appropriate. The parties provided written submissions on this preliminary matter of determining the method of hearing.

### BACKGROUND

[4] The Appellants operate a pump and haul sewage truck business for both commercial and residential waste in the Fort St. John and Charlie Lake area.

[5] On November 10, 2018, a Conservation Officer attended Mr. Kitzke’s property in response to notification from a neighbouring business competitor that there was open burning occurring at Mr. Kitzke’s property. The Conservation Officer discovered the black plume of smoke was originating from a fire containing approximately 100 wood pallets.

[6] Upon his return to the property, Conservation Officers conducted “a warned, secondary cautioned audio recorded statement”<sup>1</sup> with Mr. Kitzke. The Respondent asserts that Mr. Kitzke stated he was burning pallets that he cannot give away, that the pallets did not come from a business and no business was being conducted on the property.

[7] The Conservation Officers executed several warranted searches in November 2018 as part of their investigation into whether the Appellants had violated the *Waste Discharge Regulation* under the *EMA*. The focus of the investigation was whether the Appellants were

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<sup>1</sup> Determination of Administrative Penalty dated March 14, 2022 at para. 4.

engaged in the “burning, partial burning or incineration of waste material generated from an industry, trade or business”<sup>2</sup> without a permit to do so.

[8] On June 7, 2021, a Notice Prior to Determination of Administrative Penalty (“Notice”) was issued to the Appellants recommending a penalty of \$70,000 for burning wood waste in violation of section 6(3) of the *EMA*. In that Notice, the Appellants were notified of their right to an Opportunity to be Heard (“OTBH”) prior to the final determination of the penalty.

[9] An OTBH is a hearing (oral or written) on the matter which provides an opportunity for an individual who may be subject to an administrative penalty to both hear the allegation of a contravention and the associated evidence against them, and to provide the decision-maker with any information that they wish to prior to a determination being made on any penalty. The Appellants accepted this opportunity and engaged legal counsel who represented them at the OTBH by submitting written submissions on their behalf.

[10] Following the OTBH, Andreas Wins-Purdy, Director, Ministry of Environment and Climate Change Strategy, (the “Director”) concluded the Appellants had contravened section 6(3) of the *EMA*. In the consequent Decision of Administrative Penalty dated March 14, 2022, (the “Decision”) the Director concluded that the penalty amount would be reduced from the \$70,000, called for in the Notice, to \$32,000.

### Notice of Appeal to the Board

[11] On April 13, 2022, the Appellants filed a Notice of Appeal with the Board. The Appellants submit that the Director:

1. erred in law and fact by concluding the Appellants violated the *EMA* by burning business waste;
2. breached, by concluding the Appellants had violated the *EMA* without seeking submissions from the Appellants:
  - 1) the Appellants’ procedural fairness rights;
  - 2) the Appellants’ rights under section 11 of the *Canadian Charter of Rights and Freedoms* (the “Charter”);
  - 3) Charter values; and
  - 4) the Appellants’ rights under the applicable statutory scheme.
3. breached the Appellants’ procedural fairness rights by not ordering an oral hearing before another adjudicator (other than the Director) after the Director “had already concluded (pre-judged) without the benefit of submissions from

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<sup>2</sup> *Waste Discharge Regulation*, B.C. Reg 76/2022, s.2.

the Appellants that the Appellants had violated the *EMA*<sup>3</sup>; and, in the alternative,

4. erred in ordering the \$32,000 fine because it is “clearly disproportionate, excessive, and contrary to the letter and spirit of the *EMA* and the *Administrative Penalties Regulation*.”<sup>4</sup>

[12] The Appellants ask the Board to do the following, as remedies:

1. Set aside the Director’s Decision;
2. find the Appellant did not violate the *EMA*; or, alternatively,
3. set aside the Director’s Decision and return the matter to the Director, so that an oral hearing can be set before another adjudicator to determine liability, and, if need be, the appropriate penalty; or, alternatively,
4. set aside the fine and order a fine of no more than \$500, with an order that the Appellants are not to burn pallet wood unless they have proper authorization.

## Issue

[13] The issue posed by this preliminary matter is: What is the appropriate method of hearing for this appeal – oral, written or a combination of both?

## DISCUSSION AND ANALYSIS

[14] The Board has the power to determine the method of hearing for all matters that come before it. The *Administrative Tribunals Act*, S.B.C. 2004, c.45, (the “*ATA*”) at section 36, permits the Board to hold any combination of written, electronic and oral hearing in an application, including an appeal, or an interim or preliminary matter. This power is reiterated in the Board’s Rules, established under the authority of section 11 of the *ATA*.

[15] The Board’s Rule 17 states:

1. The Board will decide whether a hearing will be conducted:
  - a. Orally,
  - b. By way of written submissions,
  - c. By telephone or videoconferencing, or
  - d. A combination of the above.

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<sup>3</sup> Notice of Appeal at para. 9(e).

<sup>4</sup> Notice of Appeal at para. 9(f).

[16] While it is clear the Board has the power to determine the method of hearing, the Board's Practice and Procedures Manual, as well as earlier decisions of the Board on the same subject, provide guidance on how those determinations are made.

[17] The Board's Practice and Procedures Manual at pages 23-24 states:

When considering the type of hearing to be held, the Board will give careful consideration to balancing the process to be followed with the nature and complexity of the appeal, any views expressed by the parties, the likelihood that there will be conflicting evidence and/or credibility issues that will need to be assessed, the number of parties involved in the appeal, whether there are any language or literacy barriers to a particular type of hearing, and the potential for community interest in the appeal.

If there are issues of credibility, complex issues that require oral evidence or other circumstances that warrant having the parties, participants and the panel to be in the same room, the Board will schedule an oral hearing.

[18] A recent Board decision<sup>5</sup> found that the Manual's guidance is not an exhaustive or closed list, nor does it imply that an oral hearing will be held where these criteria are not met.

### **The Appellants' submissions**

[19] The Appellants request an oral hearing of this appeal. The Appellants submit, in full, that:

the Director has not tendered the necessary clear, cogent and convincing evidence capable of discharging its high burden of proving a violation of the EMA, and that a fine in any amount was not and is warranted. Whether the matter be considered criminal, regulatory or quasi-criminal in nature, it is clear that in circumstances like these where the Appellants are subject to the potential of such high fines (\$32,000), jeopardizing their very livelihood, that the highest degree of procedural fairness be afforded to them. This must include an oral hearing with an opportunity to cross-examine witnesses, call witnesses and make oral submissions, including on whether the Director has met its onus of establishing a breach, and, if necessary, what the appropriate fine should be for burning wood on one single occasion (see for example: *Khan v. Ottawa (University of)*, 1997 CanLII 941 (ON CA). And, regarding the importance of cross-examination see: *R v. Lyttle*, [2004] 1 S.C.R. 193, 2004 SCC 5).

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<sup>5</sup> *Peace River Coal Inc. v. Director, Environmental Management Act*, 2022 BCEAB 17 ("Peace River")

## Summary of the Respondent's submissions

[20] The Respondent requests a written hearing of this appeal. The Respondent submits, in part, that:

The Board can fairly and efficiently hear this appeal by written submissions for the following reasons: (1) the issues raised in this appeal are not novel; (2) the Appellant has failed to identify any significant conflicting evidence or issues of credibility that cannot be effectively presented and reviewed by written submissions; (3) the procedural fairness issues raised by the Appellant do not support an oral hearing; and (4) the Appellant has not identified any public interest reason that would support an oral hearing.

[21] The Respondent elaborated on each of those four points noted above and identified earlier Board decisions to support a written hearing of this appeal.

## The Panel's findings

[22] The *ATA*, the Board's Rules, and the Board's Practice and Procedures Manual, alongside previous decisions of the Board, notably *Peace River*, identify the three predominant factors to be considered by the Board when deciding to convene an oral hearing of an appeal before it. These are:

- the parties require an oral hearing to fully and fairly present their cases,
- the Board requires an oral hearing to make a fair and informed decision on the appeal, and
- the public can view proceedings that impact it, in a fair and accessible manner.

[23] I will turn to the specific circumstances of this appeal and consider how these affect the preceding factors.

[24] In my evaluation of the specific circumstances of this appeal and the issues that are raised by the parties, I find that this appeal can be characterized in the following manner:

1. There are two parties to this appeal: the Appellants (Mr. Kitzke and his company) and the Respondent (the Director);
2. This is an appeal of a Determination of Administrative Penalty for a contravention under the *EMA*;
3. The parties are both represented by legal counsel; and,
4. The grounds for appeal are **primarily** concerned with the Appellants' procedural fairness rights.

[25] The Board regularly hears appeals of determinations of administrative penalty and this appeal does not inherently raise novel issues that would indicate that an oral hearing would be appropriate. Indeed, counsel for the parties have not identified any novel issues that will need to be adjudicated in the course of this appeal. Consequently, I agree with the Respondent that the scope and nature of the review here is not complicated nor particularly novel and indicates that a written hearing is appropriate in these circumstances.

[26] Neither party asserted any difficulties in providing written submissions and in my review of the quality of the submission provided by both parties' legal counsel so far, I am confident that both legal counsel are adept at making their submissions in writing.

[27] The Appellants do, however, submit that the Director erred "in fact by concluding the Appellants violated the *EMA* by burning business waste"<sup>6</sup> and that this is an evidentiary issue that must be addressed by the parties through witness testimony.

[28] Evidence introduced through witness testimony is common to both oral and written hearings, though the method by which this evidence is introduced differs. Witnesses in an oral hearing may provide their evidence in person, verbally, while witnesses in a written hearing provide their evidence by way of a sworn (or affirmed) affidavit. Absent complicating or novel factors, the need for the parties to introduce evidence in this appeal does not suggest a preference between either an oral or a written hearing, as both methods of hearing accommodate this evidence. This is particularly true where both parties are represented by legal counsel who are familiar with those different hearing processes and are skilled at presenting evidence in both settings.

[29] The testing of the opposing party's evidence through cross-examination of its witnesses, however, is a factor that lends weight to the oral hearing of a matter. This is due to the ease with which an individual can be asked questions in person. Cross-examination of an individual through written questions and responses (i.e. interrogatories) are possible, though they can be time-consuming and lack the flexibility that accompanies an in-person cross-examination.

[30] Given the ease of oral cross-examination relative to written interrogatories, the Appellants' stated intention to cross-examine witnesses lends support to an oral hearing being the appropriate method of hearing. However, the *ATA* and the Board's Rule 17 contemplate that the method of hearing an appeal can be a hybrid of both an oral and a written process. The Board's process allows the Board to conduct the hearing in writing subject to the parties applying to cross-examine a witness, and this flexibility renders the Appellants' intention to cross-examine witnesses a neutral consideration.

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<sup>6</sup> Notice of Appeal at para. 9(a).

[31] The Appellants submit that their business and livelihood are at risk due to the \$32,000 administrative fine and because of this risk the Appellants should be granted an oral hearing. The Respondent submits that the Appellants failed to provide any evidence to support this assertion and, without more, is insufficient to require an oral hearing. In addition, the Respondent refers to the *Peace River* decision where the Board held that written hearings are appropriate in cases where the administrative penalties are significantly higher. They note the administrative penalty in that case is \$809,200.

[32] I agree with the Appellants that while a risk to the business would tend to favour a higher level of procedural fairness, I have nothing before me to support their claim that Mr. Kitzke's livelihood is at stake, as the Appellants assert, or that there is a degree of significant impact on Mr. Kitzke or Kalia Resources Corp. as a result of the penalty.

[33] I find there is insufficient evidence before me to conclude that the parties cannot fully and fairly present their evidence and make their arguments in writing. Furthermore, there is insufficient reason to conclude that the Board requires an oral hearing to make a fair and informed decision on the subject matter involved in this appeal.

[34] Finally, neither party has identified any members of the public that have any interest in the outcome of this case. As such this factor does not support an oral hearing of this appeal. The public may still engage with this matter through reading these reasons, and the reasons for decision provided by the Board after a determination of the appeal on its merits.

[35] After considering the parties' submissions and the guidance provided by prior Board decisions and the Board's Practice and Procedures Manual, I find that this appeal can be fairly determined through a written hearing. In the same way that previous panels of the Board have determined that oral cross-examination of a witness may be appropriate, I also find that the parties may apply to the Board for oral cross-examination on the contents of any affidavits, after reviewing them, in the normal course of this appeal. As set out in *Peace River*, such a request will need to describe the subject matters to be addressed in the cross-examination and establish why oral cross-examination would be required or of assistance to the Board in deciding the appeal.

## **DECISION**

[36] In reaching my decision on this preliminary matter, I have read and considered all submissions of the parties, even if not specifically referenced here.



[37] For the reasons provided above, I find the appeal will proceed by way of a written hearing.

“Shannon Bentley”

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Shannon Bentley, Panel Chair  
Environmental Appeal Board